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NO. 547 / 3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947 48

UNITED STATES OF AMERICA,

PETITIONER

versus

FRED URBUTEIT, Claimant of 16 Articles of Device More or Less, Labeled "SINUOTHERMIC", etc.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OCTOBER TERM, 1947

NO. 577

UNITED STATES OF AMERICA,

PETITIONER

versus

FRED URBUTEIT, Claimant of 16 Articles of Device More or Less, Labeled "SINUOTHERMIC", etc.

BRIEF FOR THE RESPONDENT

For the purpose of brevity this brief will omit repetition of and changes in the recitations made in the Petition and Brief of Petitioner, but the Court is requested to consider the statement of the case contained in the opinion of the Circuit Court of Appeals (R. 179) as a fair and accurate summary of the matters of fact and law that are involved.

Summary of Argument:

Respondent contends that the petition should not be granted for the following reasons:

1. The statutory construction made by the Circuit Court of Appeals is correct.

   (a) The language is susceptible to no other interpretation.

   (b) The explanation given to a Congressional Committee and quoted by Petitioner on Page

17 of its Petition shows that Congress was not informed of the possibility of any such construction as is now contended for by Petitioner.

2. The finding of the Circuit Court of Appeals that as a matter of fact the leaflets involved did not constitute "labeling" in their very nature is correct.

3. No misrepresentations as to the diagnostic capacity of the "Sinuothermic" device were admitted or established as contended by Petitioner.

4. A proceeding for seizure and condemnation is limited by Section 304 (a) of the Food, Drug and Cosmetic Act to "Any article of food, drug, device, or cosmetic that is adulterated or misbranded *when introduced into or while in interstate commerce.*"

5. Certiorari should not be granted in this case because the opinion of the Circuit Court of Appeals for the Fifth Circuit conflicts with the palpably erroneous holding of the Seventh Circuit on the meaning of "accompanying", but that error should be corrected in the case of United States vs Kordel. (See Appendix to Petition)

ARGUMENT

1. THE STATUTORY CONSTRUCTION MADE BY THE CIRCUIT COURT OF APPEALS IS CORRECT.

(a) Both the opinion of the Circuit Court of Appeals (R. 180) and the Petition (page 3) quote the parts of the Federal Food, Drug and Cosmetic Act involved in this case. That part of Sec. 201 defining "labeling" is here quoted also:

"(m) The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

Mr. Webster defines "accompany" as meaning "to keep company with; escort; join in movement or action." The Federal Food, Drug and Cosmetic Act relates to the shipment in interstate commerce of foods, drugs, cosmetics and therapeutic devices, so it is obvious that "accompanying" ir the statute means "accompanying in interstate commerce". It is a cardinal rule of statutory construction that ordinary words must be given their ordinary and accepted meaning and "accompanying" cannot be stretched so as to eliminate the time element and other factors necessarily implied in the connotation of the word and without which it would be meaningless.

The Congress is composed of people who certainly have a better than average command of both written and spoken English, and many are exceptionally well versed in the choice of words and their proper usage, and it is an insult to the intelligence of the members of Congress to say that by their language used in the quoted statute they meant anything like what the Petitioner claims they meant. As Judge Sibley remarked to Petitioner's counsel during his argument before the Circuit Court of Appeals—"if your law is not broad enough get a new one but don't try to stretch it".

(b) On page 17 of the Petition is quoted the statement made by Walter G. Campbell, then Chief of the Food and Drug Administration, made to a Congressional Committee in explanation of the definition when the Committee of the Seventy-Third Congress, Second Session, was considering the Food, Drug and Cosmetic Act. There is nothing whatever in that language to indicate that Mr. Campbell even had in mind the possibility of

such a construction as is now contended for by Petitioner. It is clear that Mr. Campbell was intent on having the law changed so that it would not only have "control over those statements that are attached to or that accompany the package in the form of circulars" but would include "all circulars and material and placards for display purposes and the like that may in any form whatever accompany the article of food, drug, or cosmetics". Please note that he is talking about the form of the material—"form of circulars" and "any form whatever" and not the manner of accompaniment.

The abortive attempt of the Administrators of the Act to seize power not granted to them and attribute meanings to its language that are illogical and that were never intended is spotlighted by the record of Mr. Campbell's statement to Congress.

2. THE FINDING OF THE CIRCUIT COURT OF APPEALS THAT THE LEAFLETS DID NOT CONSTITUTE LABELING IS CORRECT.

Petitioner has argued at considerable length and has removed from their context and quoted a number of statements contained in the leaflet involved in this case in a vain effort to show that the leaflet constitutes labeling of the Sinuothermic device. The opinion of the Circuit Court of Appeals (R. 181) deals with the nature of this leaflet and states that "It may be doubted that the printed matter is in its nature a labeling for the machines". The Court there deals with a matter of fact —facts peculiar to the instant case—and not with the construction of a statute, and its analysis and statement of the facts is fair, sensible and sound, and its conclusion, based on the facts, is planted on a firm foundation and cannot easily be assailed.

3. NO MISREPRESENTATIONS AS TO THE DIAGNOSTIC CAPACITY OF THE "SINUOTHERMIC" DEVICE WERE ADMITTED OR ESTABLISHED AS CONTENDED BY PETITIONER.

Petitioner, in contending that it would be entitled to a decree of condemnation IF the leaflets were labeling and IF they accompanied the devices and IF the statements in the leaflets contained false representations as to the therapeutic value of the device, plants its contention on a false premise—that the evidence which the Circuit Court of Appeals held was improperly excluded by the District Court did not relate to the diagnostic capacity of the machines. Now the nature of the evidence excluded can be learned from one place only and that is the proffer, objections to which the District Court sustained. (R. 162) In that proffer it was plainly stated that Claimant offers to testify as to his diagnosis with the use of the Sinuothermic machine and otherwise . . . ., so it is readily apparent that the contention of Petitioner is nothing but wishful thinking.

The effort of Petitioner to attribute to the word "diagnosis", and statements concerning diagnosis, meanings and imputations that no sensible person would ever seriously think of, would be laughable if not involved in such a serious matter. There are many mechanical instrumentalities used in diagnosis by the several branches of the healing art, and some of them do remarkable things, but they are useless without the human personality and the trained mind that can draw conclusions from the factors indicated. As simple a thing as an electric meter "registers exactly"—but how many people who pay electric bills can tell just what it registers or what it means. Its simply an aid to the electric company in making its diagnosis of the customer's liability, and a human mind is required to read the meter and calculate

the liability. We say that we were examined or our case was diagnosed by or with an x-ray, or an electro-cardiograph or something else, and that the x-ray showed so and so or the electro-cardiograph reading showed such and such a condition, but we don't mean to intimate that anything was done without the intervention of a trained mind and no one would think of attributing any such meaning to our statement.

The argument contained in the petition on this point is puerile. The writer of this brief knows that the Solicitor General did not originate it. This writer heard the idea hinted at by an attorney for the Food and Drug Administration in Washington a while back and supposes that the Solicitor General can hardly be expected to sift all the chaff out of the wheat in the cases that are sent to him.

4. A CONDEMNATION PROCEEDING IS LIMITED TO ANY ARTICLE MISBRANDED WHEN INTRODUCED INTO OR WHILE IN INTERSTATE COMMERCE.

The Federal Food, Drug and Cosmetic Act has numerous prohibitive provisions—some civil and some criminal in their nature—and they are applicable under varying conditions. The authority for and the conditions surrounding the institution of a condemnation proceeding such as is involved in this case is contained in Section 304 (a) of the act and that section is quoted on page 3 of the Petition. To come within that section an article must be adulterated or misbranded *when introduced into or while in interstate commerce.* Now it is clear that the devices and the leaflets were never in interstate commerce at the same time so by no stretch of the imagination can it be said that the devices were misbranded when introduced into interstate commerce or

while in interstate commerce, and this fact remains true regardless of whether or not the leaflets were labeling and false. There simply was no statutory authority for this proceeding in the first place as by Petitioner's own testimony the alleged misbranding could not have taken place until after the devices had passed out of interstate commerce and come to rest and been put to use in Ohio.

5. CONFLICT BETWEEN TWO CIRCUITS SHOULD NOT CAUSE CERTORARI TO BE GRANTED EXCEPT IN THE CASE WHERE THERE IS ERROR.

In petitioning for a writ of certiorari in this case Petitioner asks this Court to take jurisdiction because there is a conflict in the opinion of the Circuit Court of Appeals for the Fifth Circuit in this case and the opinion of the Circuit Court of Appeals for the Seventh Circuit in the case of United States vs Kordel, not reported. (See appendix to the Petition for the opinion). It is the understanding of this writer that a petition for certiorari in the Kordel case has or will in due course be filed.

The Kordel case is a criminal proceeding—this one is civil. The conflict is in the construction of that part of the statute that uses the word "accompanying". On that point one Court is clearly right and the other definitely wrong. There is no middle ground and there is no reconciliation of the two opinions. It is not a very complicated question. The Solicitor General has presented his argument in this case and there is nothing more that he can offer on the point. If this Court agrees with the Circuit Court of Appeals for the Fifth Circuit there is no necessity for certiorari in this case and the error of the Circuit Court of Appeals for the Seventh Circuit can be corrected in the Kordel case in due course.

CONCLUSION

This brief has not dealt with the real merits of respondent's case because the questions before this Court are principally of a technical nature. The Petition by inference and comment here and there attempts to give the impression that Respondent is an unscrupulous crook and his device a fraud. The facts and the ins and outs of the case cannot be gone into here but because of the attempted aspersions this writer is impelled to call the attention of the Court to the fact that medical history discloses that one after another of the progressive doctors and scientists of days gone by were condemned by the intrenched profession of their day, and that usually there was a ready and willing government or agency that jumped when the string was jerked. Never was there a fair or scientific study but always the same old story—the "expert opinions" of those who knew so much they were unwilling to be shown. Unwilling to investigate—unwilling to look—unwilling to learn—but eager to testify and persecute. That is the record in this case—both the actual and official Court record—and the record that is not a part of this proceeding but the history of Respondent's experiences.

Respondent respectfully asserts that there is no error in the opinion of the Circuit Court of Appeals for the Fifth Circuit and consequently no reason for the issuance of a writ of certiorari to that Court.

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Attorney for Respondent

February 1948.